IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-375

GENEVIEVE M. HADDAD,
Petitioner,

v.

THE CROSBY CORPORATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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PRIOR DECISIONS

The complaint together with companion government and private complaints was dismissed in *In re Mutual Fund Sales Antitrust Litigation*, 374 F. Supp. 95 (D.D.C. 1973). The government appealed directly to the Supreme Court under the Expediting Act while this action was stayed in the Court of Appeals. The dismissal of the government complaint was affirmed in *United States* v. *National Association of Securities Dealers*, 422 U.S. 694 (1975). Thereafter the Court of Appeals affirmed the

dismissal of this complaint reserving for the District Court only a narrow issue concerning the construction of the complaint. *Haddad* v. *Crosby Corp.*, 175 U.S. App. D.C. 112, 533 F.2d 1247 (1976). The District Court dismissed for the second time, *Haddad* v. *Crosby Corp.*, C.A. 2454-72 (D.D.C. June 30, 1977), and the Court of Appeals affirmed the second dismissal. *Haddad* v. *Crosby Corp.*, C.A. 77-1786 (D.C. Cir. June 6, 1978).

QUESTION PRESENTED

Whether the lower courts correctly construed and dismissed the complaint in this civil suit for alleged antitrust violations in connection with the sale of mutual fund shares.

COUNTER STATEMENT OF THE CASE

Petitioner Haddad, after nearly six years of litigation, seeks to have her complaint construed for the fifth time. Despite repeated judicial readings and her own differing interpretations, petitioner still insists that the complaint has not been properly construed by the courts.[1]

Original Proceedings in the District Court

Petitioner Haddad commenced this action on December 8, 1972 by filing a complaint in the United States District Court for the District of Columbia. The action was brought purportedly on behalf of a world-wide class of all persons who might have purchased shares of any load mutual fund from a broker-dealer or who might have redeemed such shares during the indeterminate period covered by the complaint. Additionally, she purported to sue on behalf of a subclass of all persons who might have purchased shares of any so-called "Fidelity Group" load mutual fund from a broker-dealer or who might have

[1] The complaint is attached as an Exhibit hereto.

redeemed such shares during the same indeterminate period. Petitioner sought treble damages and injunctive relief under the antitrust laws.[2]

On February 21, 1973 the United States Department of Justice filed a similar complaint in *United States* v. *National Association of Securities Dealers*, C.A. 338-73 (D.D.C.). On March 5, 1973 another private action, *Gross v. National Association of Securities Dealers*, C.A. 426-73 (D.D.C.), was commenced which, in the words of the District Court, "substantially duplicate[d] the government allegations."[3] In the wake of these suits some fifty private class actions for treble damages were filed in various federal district courts and transferred to the District Court below by the Judicial Panel on Multidistrict Litigation.[4]

Further proceedings in all the cases were stayed pending disposition of motions to dismiss the complaints in the *Haddad*, *Gross* and *United States* actions. These motions were made pursuant to Fed. R. Civ. P. 12(b) on the ground that the antitrust activities alleged in the complaints had received statutory and implied immunity from Congress under provisions of the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.* and the Maloney Act, 15 U.S.C. ch. 2B.

The three motions were consolidated for briefing and argument. This was not merely a matter of convenience, but because of the identity of issues. In her brief opposing the motions Haddad said:

[2] Petitioner alleged in a separate cause of action that respondents' failure to disclose their alleged antitrust violations constituted an infraction of the federal securities laws.

[3] *In re Mutual Funds Sales Antitrust Litigation*, 374 F. Supp. 95, 97 (D.D.C. 1973), *aff'd sub nom. U.S.* v. *N.A.S.D.*, 422 U.S. 694 (1975).

[4] *In re Mutual Fund Sales Antitrust Litigation*, 361 F. Supp. 638 (J.P.M.D.L. 1973).

> [T]he core allegation in each Complaint [her's, the government's and *Gross* v. *N.A.S.D.*, *supra*] is identical; viz., that the defendants have knowingly combined and conspired by express agreement or otherwise, to stifle and suppress the development of "secondary" trading markets in mutual fund shares, both on the dealer level and between investors through the medium of a broker or agent. Plaintiff's Mem. of Law in Opp. to Defendants' Motions to Dismiss at 2.

Haddad further noted:

> In this case, the "set of facts" which plaintiffs have offered to prove . . . includes the basic charge made in the *Haddad* Complaint—that defendants have combined, agreed and conspired to suppress and eliminate a secondary mutual fund market in this country—*as expanded by the more detailed Government Complaint and offer of proof* . . . . *Id.* at 6. (Emphasis added).

Oral argument was divided among counsel for plaintiffs in the three actions. Petitioner's counsel argued the question of alleged horizontal restraints on behalf of Haddad and the government.[5] Significantly, neither in briefing nor in oral argument did petitioner contend that the *Haddad* complaint alleged a horizontal conspiracy different from that in the two other actions. More importantly, petitioner never claimed to allege a horizontal conspiracy among funds to restrain interbrand competition. Thus the horizontal conspiracy which petitioner pleaded and argued in the District Court for herself and the government was the same horizontal conspiracy alleged and advocated by the government and dismissed by

[5] Haddad's counsel specifically identified the allegations of horizontal restraint by stating at oral argument that "each of the complaints alleges a broad industry-wide horizontal conspiracy." Joint Appendix at 329 in *United States* v. *National Associaiton of Securities Dealers*, 422 U.S. 694 (1975), noted in *id.* at 731 n.43.

this Court in *United States* v. *National Association of Securities Dealers*, 422 U.S. 694 (1975).[6]

On December 14, 1973 the District Court (Corcoran, J.), dismissed the complaints in a single opinion holding that the complaints severally failed to state a claim upon which relief could be granted. The court noted that "[t]he gravamen of [the] complaints . . . [was] that the defendants have conspired to use the primary distribution system to foreclose the development of a secondary market in mutual fund shares. This is allegedly accomplished through the use of the uniform sales agreements . . . which even after the primary distribution of the shares, set the price at which the shares shall thereafter be sold. . . ." [7] The court held that all the activities alleged to be unlawful were either expressly sanctioned by statute or subject to the exclusive jurisdiction of the Securities and Exchange Commission and, consequently, immune from antitrust challenge.[8]

The Government's Appeal to the Supreme Court

The government appealed the District Court's decision directly to this Court under the Expediting Act, 15 U.S.C. § 29. Haddad appealed to the Court of Appeals requesting a stay of proceedings pending this Court's decision in the government's appeal on the ground that,

[6] The so-called "process of attrition [of] the 'horizontal' count" referred to in the Petition for a Writ of Certiorari at 5 (hereinafter "Petition") was only the abandonment of attack on the N.A.S.D. rules by counsel for petitioner on behalf of Haddad and the government at oral argument in favor of a broader attack aimed at alleged conduct beyond the N.A.S.D.'s rule-making authority. This was noted by this Court. *Id.* at 731-732 n.43, citing Joint Appendix at 328-332.

[7] *In re Mutual Fund Sales Antitrust Litigation*, 374 F. Supp. 95, 103-04 (D.D.C. 1973).

[8] *Id.* at 108-114.

as she stated, "[i]t is obvious that . . . the outcome of that case will directly control the result in the [*Haddad*] appeal." [9] The stay was accordingly granted.

On June 26, 1975 this Court affirmed the dismissal of the government complaint.[10] It recognized that the *Haddad* and government complaints were "premised on similar theories." [11] The Court (Powell, J.) held that the vertical agreements restricting a secondary market in mutual fund shares alleged in Counts II-VIII of the government complaint were immune from antitrust attack under Section 22(f) of the Investment Company Act. It further held that the broad horizontal agreement alleged in Count I had antitrust immunity because of the pervasive regulatory power over the mutual fund industry vested in the SEC by the Maloney and Investment Company Acts.[12]

In discussing the alleged horizontal conspiracy, the Court observed in passing that the government did not contend the defendant-appellees' activities "have had the purpose or effect of restraining competition *among* the various funds." [13] "Indeed, it appears that vigorous interbrand competition exists in the mutual-fund industry," said the Court, citing a recent SEC study of the indus-

[9] Haddad's Stay Motion & Memorandum in Court of Appeals, C.A. No. 74-1347 at 2 (D.C. Cir. filed March 15, 1974). The District Court noted on remand that Haddad represented that the outcome of the government's case would control her own. *Haddad* v. *Crosby Corp.*, C.A. 2454-72 (D.D.C., June 30, 1977) Mem. Op. at A-28 of Petition (Hereinafter *Haddad* v. *Crosby II*). The District Court's opinion has been published in [1977] Trade Reg. Rep. (CCH) ¶ 61,503.

[10] *U.S.* v. *N.A.S.D.*, 422 U.S. 694 (1975).

[11] *Id.* at 700 n.5.

[12] *Id.* at 729-735.

[13] *Id.* at 733. (Emphasis added).

try.[14] The alleged horizontal conspiracy "was designed to encourage the suppression of intrafund secondary market activities, precisely the restriction that the SEC consistently has approved pursuant to § 22(f) for nearly 35 years." [15]

As a result of this decision, the plaintiff in *Gross* acquiesced in summary affirmance of the District Court's dismissal of that complaint.[16] The District Court also dismissed the fifty class actions which had been previously stayed; no appeal was taken in any of those actions.

Petitioner's First Appeal to the Court of Appeals

Notwithstanding Haddad's earlier position that the outcome of the government's appeal would "directly control the result" in her case and that the government's complaint actually "expanded" her own,[17] she sought plenary review in the Court of Appeals. Seizing upon Mr. Justice Powell's remark that the government did not allege that the industry-wide activities complained of in *United States* v. *National Association of Securities Dealers, supra,* restrained competition "among the various funds[,]" [18] petitioner argued for the first time in the Court of Appeals that her complaint differed from the government's, claiming it alleged an interfund conspiracy.[19] In so doing, petitioner specifically relied on the allegations of paragraph 42 of the complaint.[20]

[14] *Id.* at 733 n.44.

[15] *Id.* at 733.

[16] *Gross* v. *N.A.S.D.*, C.A. No. 74-1361 (D.C. Cir., Sept. 29, 1975).

[17] *See* text accompanying note 9, *supra,* and Plaintiff's Mem. of Law in Opp. to Defendants' Motions to Dismiss at 6.

[18] *U.S.* v. *N.A.S.D., supra* at 733.

[19] Appellant's Brief in *Haddad* v. *Crosby Corp.*, 175 U.S. App. D.C. 112, 533 F.2d 1247 (1976) (Hereinafter *Haddad* v. *Crosby I*) at 16.

[20] *Id.* at 10-11.

On April 5, 1976 the Court of Appeals affirmed, with reservations, dismissal of the *Haddad* complaint. The court agreed with respondents that no agreements—intrafund or interfund—which fell outside the scope of the antitrust immunity recognized in *United States* v. *National Association of Securities Dealers, supra,* were explicitly alleged in the *Haddad* complaint. The absence of such explicit allegations should have ended the case. However, the Court of Appeals, exercising extreme caution, remanded the complaint to the District Court to determine whether there were any "implicit" allegations of interfund agreements impairing competition arising from factors other than price.[21] In particular, the court suggested that on further scrutiny such implicit allegations might be found in paragraph 42(f) of the complaint, but also noted that this paragraph might imply conduct within the antitrust immunity found by this Court.[22] Accordingly, the case was remanded to the District Court for reexamination of the complaint in accordance with these suggested possibilities.

Proceedings on Remand in the District Court

Briefs were again submitted and oral argument had before Judge Corcoran. Petitioner did not address the suggestion of the Court of Appeals that paragraph 42(f) of the complaint might be read implicitly to allege interfund conspiracies. Instead petitioner shifted her position, relied on paragraphs 33-40 and claimed the complaint alleged a conspiracy among "brokers."[23] The court took note of this,[24] but nevertheless re-assessed the complaint

[21] *Haddad* v. *Crosby I, supra,* 175 U.S. App. D.C. at 115, 533 F.2d at 1250.

[22] *Id.*

[23] Plaintiffs' Statement of the Case's Posture Subsequent to Remand at 3.

[24] *Haddad* v. *Crosby II, supra* at A-32 of Petition.

as a whole. The District Court thereupon again dismissed the complaint, finding that petitioner only alleged a conspiracy concerned with "maintaining the public offering prices which customers must pay to purchase mutual fund shares in the primary market" and that "her arguments are devoid of a single reference to possible anticompetitive purposes or effects of the scheme suggested other than price maintenance."[25] Thus it held the complaint contained no implicit averments such as the Court of Appeals suggested might be alleged.[26]

Petitioner's Second Appeal to the Court of Appeals

Petitioner then sought a fourth reading of her complaint by appealing from the second dismissal of the District Court. Briefs were yet again submitted and oral argument had. On June 6, 1978 the Court of Appeals stated that "the issues presented occasion no need for an opinion," and affirmed the District Court's second dismissal of the complaint "on the basis of Judge Corcoran's opinion in the District Court."[27] It is from this affirmance that Haddad petitions for a writ of certiorari.

The Petition for a Writ of Certiorari

Haddad's petition attempts to reargue this Court's decision in *United States* v. *National Association of Securities Dealers, supra,* rather than explicate her complaint. Focusing once again on the alleged suppression of "both the secondary brokerage and secondary dealer markets,"[28] petitioner erroneously states that "the gov-

[25] *Id.* at A-32-33.

[26] *Id.*

[27] *Haddad* v. *Crosby Corp.*, C.A. No. 77-1786 (D.C. Cir. June 6, 1978) Mem. Op. (Hereinafter *Haddad* v. *Crosby III*).

[28] Petition at 8. This is the same characterization this Court gave to the government complaint. *U.S.* v. *N.A.S.D., supra* at 700, 730.

ernment case was limited to the vertical restraints" and that "[t]his Court expressly found that there were no horizontal restraints charged in the Government case . . . ." [29] This misstatement is flatly contradicted by this Court's specific reference to the government's allegations of horizontal conspiracy:

> In this instance, maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards. This is hardly a result that Congress would have mandated. We therefore hold that with respect to the activities challenged in Count I of the complaint, the Sherman Act has been displaced by the pervasive regulatory scheme established by the Maloney and Investment Company Acts. 422 U.S. at 734-735.

Petitioner nevertheless relies upon the same purported evidence of horizontal activity relied upon by the government and rejected by this Court.[30] Moreover, petitioner continues to emphasize that the alleged conspiracy pertains to vertical contracts.[31] These are the very agreements which were challenged in Counts II-VIII in the government case and approved by this Court.[32]

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[29] Petition at 10, 5.

[30] *Compare id.* at 13 n.22 *with* Brief for the United States in *U.S.* v. *N.A.S.D.* at 51 n.47 and Joint Appendix at 276-77. *See also* Brief for the N.A.S.D. in *U.S.* v. *N.A.S.D.* at 16-20. Indeed, counsel for petitioner, speaking before the District Court on behalf of Haddad and the government with respect to the alleged horizontal conspiracy, referred to this same purported evidence: "What we do challenge is . . . typified by but not limited to the 1958 [sic] episode disclosed by the Government brief." Joint Appendix at 330. This Court specifically referred to this statement. *U.S.* v. *N.A.S.D.*, *supra* at 731 n.43. Petitioner's argument and the documents upon which it is based have thus already been rejected by this Court.

[31] Petition at 8.

[32] *U.S.* v. *N.A.S.D.*, *supra* at 728.

Petitioner has come full circle with her latest interpretation of the *Haddad* complaint. The factual allegations demonstrate that the complaint is essentially an antitrust attack upon the written vertical contracts among those engaged in primary market distribution and sale of mutual fund shares. The alleged conspiracy is nothing more than the concerted conduct necessarily ancillary to the creation, enforcement, and enjoyment of rights and obligations under these arrangements.

ARGUMENT

THIS COURT SHOULD NOT REVIEW THE FOURTH JUDICIAL READING AND SECOND DISMISSAL OF THE HADDAD COMPLAINT.

A. This Case Does Not Present a Question Suitable for the Granting of a Writ of Certiorari.

Haddad attempts by petition for a writ of certiorari to have her complaint read for the fifth time. Yet in her petition she avoids references to the specific allegations of her complaint.[33] Instead, her petition argues abstract points of law arising from hypothetical fact situations wholly disconnected from the allegations of the complaint.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Supreme Court Rule 19.[34]

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[33] Petitioner fails to attach a copy of the complaint to her petition in apparent disregard of the "necessity for clear, definite and complete disclosures concerning the controversy when applying for certiorari." *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924).

[34] Rule 19 further provides in pertinent part:

> The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> . . .

[footnote continued]

Surely, there are no "special or important" reasons for granting a writ of certiorari in the case at bar. Nothing petitioner has presented properly falls "within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them." *In re Woods*, 143 U.S. 202, 206 (1892).

The only question remaining after six years of litigation is whether two federal courts have correctly construed this specific complaint and its peculiarly inarticulate allegations as not containing implicit averments of antitrust conspiracies of a specific kind. Even if further reconsideration of that pleading were afforded, it could not possibly result in a precedent for other future cases.

Here, two courts have each on two separate occasions considered this complaint. Both now concur in interpreting it. Even if some other construction were possible,

> [t]he jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. *Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

Presumably the purpose of a further review of this complaint by the Supreme Court would be to obtain a decision that certain activities of the respondents are not immune from the antitrust laws by virtue of the Investment Company Act, the Maloney Act, or otherwise. But it is not practicable to reach such a decision; for the complaint fails to identify or describe the alleged activities of the respondents which, it is claimed, constitute a conspiracy among funds to restrain competition in the distribution and sale of mutual fund shares. The instant complaint, in fact, fails to meet the minimum standard of clarity required in pleadings under Fed. R. Civ. P. 8(e) that "each averment . . . shall be simple, concise, and direct." *See Conley* v. *Gibson*, 355 U.S. 41 (1957).

[34] [footnote continued]

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

. . .

Despite this lack of clarity, two federal courts have struggled with the complaint, and both have construed it in the same sense. No amount of evasion can hide the simple fact that no court has read the complaint to allege a case different from that dismissed in *United States* v. *National Association of Securities Dealers, supra.*

This Court's statement in *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211 (1948) is particularly apposite:

> A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error. 335 U.S. at 214.

Since the petitioner has failed to show that the complaint contains the implicit allegations which both the District Court and the Court of Appeals found lacking, the writ of certiorari should be denied.

B. The Court of Appeals Correctly Affirmed the District Court's Second Dismissal of the Haddad Complaint.

The Court of Appeals affirmed the District Court's second dismissal of the complaint "on the basis of Judge Corcoran's opinion." [35] The only conspiracy which the District Court found Haddad referred to was one " 'among

[35] *Haddad* v. *Crosby III, supra.*

the brokers' (rather than among the funds)" aimed at "maintaining the public offering prices which customers must pay to purchase mutual fund shares. . . ." [36]

On remand and thereafter, petitioner has done nothing more than point to allegations of increased commission costs resulting from an alleged conspiracy.[37] In so arguing, Haddad in effect has reiterated prior allegations of vertical price maintenance. The District Court found that effect on price is all that plaintiff ever alleged and held that "[h]er arguments are devoid of a single reference to possible anticompetitive purposes or effects of the scheme suggested other than price maintenance." [38]

Nor did Haddad allege any conspiracy whatsoever among funds. On remand, petitioner focused on brokers rather than upon funds.[39] Again in the Court of Appeals she recited that the "gravamen of our complaint is to be found in paragraphs 33-40 [,] . . . *in essence* a charge of a horizontal conspiracy *among brokers*. . . ." [40] This shift to an interbroker conspiracy theory was hardly surprising in light of this Court's finding that there is "vigorous" competition among the funds.[41]

However, petitioner's references to brokers in the complaint serve only to refute Haddad's assertions concerning her purported horizontal allegations. The complaint defines broker as a member of the N.A.S.D. who has "entered into and made sales pursuant to a written agreement with any one or more principal underwriters relating to the sale and distribution of capital stock of one or more load mutual funds during a continuous offering of said capital stock." [42] Although petitioner avoids references to the specific language of the complaint, the allegations are nothing more than an antitrust attack upon the written contracts which govern the relationships between the main actors in the primary market for mutual fund shares.

Thus, the arrangements petitioner has repeatedly attacked are the very ones this Court held immune from antitrust challenge.[43] Haddad initially insisted on the identity of this case and the government case. Petitioner's subsequent evasions have not succeeded in obscuring this identity and the true character of the complaint.

The Court of Appeals correctly affirmed Judge Corcoran's second dismissal of petitioner's complaint.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

[Names and addresses of counsel appear on following page]

[36] *Haddad* v. *Crosby II*, *supra* at A-32 of Petition.

[37] Plaintiff's Statement of the Case's Posture Subsequent to Remand at 3; Appellant's Brief in *Haddad* v. *Crosby III* at 10-11; Petition at 8.

[38] *Haddad* v. *Crosby II*, *supra* at A-33 of Petition.

[39] Plaintiff's Statement of the Case's Posture Subsequent to Remand at 3.

[40] Appellant's Brief in *Haddad* v. *Crosby III* at 10. (Emphasis in original).

[41] *U.S.* v. *N.A.S.D.*, *supra* at 733 n.44.

[42] *See* ¶ 3 of complaint in Exhibit.

[43] *U.S.* v. *N.A.S.D.*, *supra* at 728, 733.

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EXHIBITS

EXHIBIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2454-72

Filed: 12/8/72

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Boston, Massachusetts 02110

and

INSTITUTIONAL EQUITY CORP.
808 Travis Street
Houston, Texas 77002

and

PIEDMONT CAPITAL CORP.
177 North Dean Street
Englewood, New Jersey 07631

and

VANCE, SANDERS & COMPANY, INC.
111 Devonshire Street
Boston, Massachusetts 02109

and

WELLINGTON MANAGEMENT COMPANY, a corporation
1630 Locust Street
Philadelphia, Pennsylvania 19103

and

AMERICAN FUNDS DISTRIBUTORS, INC.
611 West Sixth Street
Los Angeles, California 90017

and

FIDELITY MANAGEMENT &
RESEARCH CORPORATION, a corporation
35 Congress Street
Boston, Massachusetts 02109

and

SUMMIT MANAGEMENT & RESEARCH CORP.
808 Travis Street
Houston, Texas 77002

and

LEXINGTON MANAGEMENT CORP.
177 North Dean Street
Englewood, New Jersey 07631

and

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.
1735 K Street, N.W.
Washington, D.C. 20006

and

INVESTMENT COMPANY INSTITUTE
1775 K Street, N.W.
Washington, D.C. 20006

and

EDWARD C. JOHNSON, 2d
35 Congress Street
Boston, Massachusetts 02109

and

EDWARD C. JOHNSON, 3d
35 Congress Street
Boston, Massachusetts 02109

and

CALEB LORING, JR.
35 Congress Street
Boston, Massachusetts 02109

and

D. GEORGE SULLIVAN
35 Congress Street
Boston, Massachusetts 02109

and

WILLIAM L. BYRNES
35 Congress Street
Boston, Massachusetts 02109

and

C. RODGERS BURGIN
138 Central Avenue
Milton, Massachusetts

and

ALFRED B. CORNELL
30 Broad Street
New York, New York

and

GEORGE S. MCEWAN
35 Congress Street
Boston, Massachusetts 02109

and

GILBERT H. HOOD, JR.
500 Rutherford Avenue
Charlestown, Massachusetts

and

GEORGE K. MCKENZIE
211 E. 23rd Street
New York, New York

and

HORACE SCHERMERHORN
58 Cliff Road
Wellesley Hills, Massachusetts

and

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.
1100 Connecticut Avenue, N.W.
Washington, D.C. 20006

and

REYNOLDS SECURITIES, INC.
1735 K Street, N.W.
Washington, D.C. 20006

and

BACHE & CO., INC.
1000 16th Street, N.W.
Washington, D.C. 20006

and

W. E. HUTTON & CO.
1815 H Street, N.W.
Washington, D.C. 20006

and

THOMSON & MCKINNON AUCHINCLOSS, INC.
1705 H Street, N.W.
Washington, D.C. 20006

and

DUPONT GLORE FORGAN, INC.
1211 Connecticut Avenue, N.W.
Washington, D.C. 20006

and

WALSTON & CO., INC.
1229 Connecticut Avenue, N.W.
Washington, D.C. 20006

and

HAYDEN STONE, INC.
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

and

BLYTH, EASTMAN DILLON & CO., INC.
1140 Connecticut Avenue, N.W.
Washington, D.C. 20006

and

DEAN WITTER & CO., INC.
1776 K Street, N.W.
Washington, D.C. 20006

and

HORNBLOWER & WEEKS-HEMPHILL, NOYES INC.
1140 Connecticut Avenue, N.W.
Washington, D.C. 20006

and

E. F. HUTTON & COMPANY, INC.
1227 Connecticut Avenue, N.W.
Washington, D.C. 20006

and

PAINE WEBBER JACKSON & CURTIS, INC.
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Defendants.

CLASS ACTION COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff, individually and in a representative capacity on behalf of all others similarly situated, by her attorneys, brings this civil action against the defendants named above to recover damages suffered by reason of defendants' violations of the antitrust and other laws of the United States of America, and to obtain injunctive relief, and complains and alleges as follows upon information and belief, except as to Paragraph 15, which is based upon personal knowledge:

FIRST CLAIM
(Antitrust)

JURISDICTION AND VENUE

1. This claim seeks relief for violations of Sections 1, 2 and 3 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2 and 3, commonly known as the Sherman Act. Jurisdiction is conferred upon this Court by Sections 4 and 16 of the Act of October 15, 1914, 38 Stat. 731, 737, as amended, 15 U.S.C. §§ 15 and 26, commonly known as the Clayton Act; and by 28 U.S.C. § 1337. This claim arose in the District of Columbia and acts in furtherance of the violations hereinafter alleged took place in interstate commerce and in the District of Columbia by use of the mails and other instrumentalities of interstate commerce; each of the defendants transacts business or does business or can be found or has an agent in the District of Columbia and is otherwise amenable to the personal jurisdiction of this Court. Venue lies in the District of Columbia by virtue of the venue provisions of the United States Code, including Sections 4, 12 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 22, 26, and 28 U.S.C. § 1391.

DEFINITIONS AND INDUSTRY BACKGROUND

2. Except as may otherwise be noted, all terms which have been defined in Sections 2 through 4, inclusive, of the Investment Company Act of 1940, as amended, 15 U.S.C.A. § 80a-2 through § 80a-4, a copy of which is attached hereto as Appendix A, shall have the same meaning herein.

3. The term "broker-dealer", as used in this Complaint, means any person registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 77b, *et seq.*, as both a securities broker and a securities dealer, who is a member of defendant National Association of Securities Dealers, and who has entered into and made sales pursuant to a written agreement with any one or more principal underwriters relating to the sale and distribution of capital stock of one or more load mutual funds during a continuous offering of said capital stock.

4. The term "mutual fund" means a management-type investment company as defined by the Investment Company Act of 1940, as amended, registered as such with the Securities and Exchange Commission, which offers for sale and has outstanding any redeemable security of which it is the issuer.

5. A mutual fund is a corporation in the business of investing its shareholders' money (raised through issues of capital stock) for more or less specific investment objectives. These investments are usually made in common stocks or other securities or obligations of other companies, in varying combinations, in the hope that the investment goals set forth for the mutual fund—e.g., dividend income, capital growth, etc.—may be realized at a reduced risk through the diversification of these investments and through the presumed skill of the investment managers. A mutual fund is basically no different than any other corporation organized in the United

States today; it issues capital stock, has certain stated corporate powers and objectives, and is subject to the general corporate law of its state of incorporation, as well as certain state and federal laws designed to protect the public by curbing abuses in the purchase and sale of securities.

6. Although, like other corporations, a mutual fund has a fixed number of authorized capital shares, it differs in that the number of its outstanding shares may vary from day to day due to its policy of continuously selling new shares and continuously redeeming shares from investors upon presentation to the mutual fund. A fund which does not redeem its shares or continuously sell new shares is known as a "closed-up fund" (not continuously offering to sell new shares) or a "closed-end fund" (neither continuously offering to sell new shares *nor* having a redemption policy).

7. A "load mutual fund", as the term is used herein, is a United States based mutual fund the shares of which are, at the time in question, distributed, offered and sold to the investing public by independent broker-dealers at a price which includes a sales charge, or "load". A "no-load mutual fund", as the term is used herein, is any type of mutual fund other than a "load mutual fund."

8. The "public offering price" of load mutual fund shares is the price at which *dealers* may sell said shares to the investing public. By law this price is the price specified in the current mutual fund prospectus, usually in terms of the net asset value of the share plus a sales charge, or "sales load", which today is commonly set at 9.3% of the net asset value of the share, for the average-size purchase (said sales load being reduced for large volume purchases). As explained more fully herein, there is no legal limitation on the selling price or sales load of mutual fund shares in transactions between investors through the agency of a *broker*.

9. The term "Fidelity Group of Funds" refers, individually and collectively, to those load mutual funds for which defendant Crosby Corporation or any of its affiliated companies acts or has acted as principal underwriter. Today these funds have net assets in excess of $3.5 billion.

10. The term "Summit Group of Funds" refers, individually and collectively, to those load mutual funds for which defendants Institutional Equity Corp. or Summit Management & Research Corp. or any of their affiliated companies acts or has acted as principal underwriter. Today these funds have net assets in excess of $24 million.

11. The term "Lexington Group of Funds: refers, individually and collectively, to those load mutual funds for which defendants Piedmont Capital Corp. or Lexington Management Corp. or any of their affiliated companies acts or has acted as principal underwriter. Today these funds have net assets in excess of $163 million.

12. The term "Wellington Group of Funds" refers, individually and collectively, to those load mutual funds for which defendant Wellington Management Company or any of its affiliated companies acts or has acted as principal underwriter. Today these funds have assets in excess of $2.3 billion.

13. The term "American Group of Funds" refers, individually and collectively, to those load mutual funds for which defendant American Funds Distributors, Inc. or any of its affiliated companies acts or has acted as principal underwriter. Today these funds have assets in excess of $2.2 billion.

14. The term "Vance, Sanders Group of Funds" refers, individually and collectively, to those load mutual funds for which defendant Vance, Sanders & Company, Inc. or any of its affiliated companies acts or has acted

as principal underwriter. Today these funds have assets in excess of $4.0 billion.

THE PARTIES

Plaintiff

15. Plaintiff Genevieve M. Haddad is a resident of the District of Columbia. As a small investor, plaintiff has purchased and sold and contemplates the future purchase and sale of mutual fund shares from time to time. In November, 1971, plaintiff purchased at the public offering price (which included a sales load of 8.5% of the public offering price or 9.3% of the amount invested) capital stock issued by Salem Fund, Inc., a load mutual fund and one of the Fidelity Group of Funds, from defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. In October, 1972, plaintiff redeemed said stock at the fund, at net asset value.

16. Plaintiff brings this action on her own behalf and as a representative of a class and a subclass pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class and subclass are each so numerous that joinder of all members is impracticable. Most, if not all questions of law and fact relating to the violations of law alleged, the trade and commerce involved and the basis for the relief demanded are common to the class and subclass, respectively, which questions predominate over any questions affecting only individual members of those classes. Plaintiff's claim is typical of the claims of the class and subclass, and plaintiff will fairly and adequately represent and protect the interests of the class and subclass. The prosecution of separate actions by individual members of the class or subclass would create a risk of inconsistent or varying adjudications with respect to individual members of the particular class and would impair or impede the ability of other class members to protect

their interests. Final injunctive or similar common relief for the benefit of the class or subclass as a whole is appropriate and is necessary to protect their future interests. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The class consists of all persons (excluding defendants or other dealers or principal underwriters or issuers) who have purchased the capital stock of any load mutual fund from a broker-dealer or who have redeemed such capital stock, during the period covered by this Complaint, which plaintiff class, it is estimated, comprises several hundred thousand persons. All such persons and the named plaintiff are collectively hereinafter referred to as the "Investors Class." The subclass consists of all persons (excluding defendants or issuers or other dealers) who have purchased the capital stock of any load mutual fund belonging to the Fidelity Group of Funds from a broker-dealer or who have redeemed such capital stock, during the period covered by this Complaint, which plaintiff subclass, it is estimated, comprises many tens of thousands of persons. All such persons and the named plaintiff are collectively referred to herein as the "Fidelity Investors Class." To the best of Plaintiff's knowledge, no other litigation concerning this controversy has been commenced by any other member of the class or subclass.

Defendants

17. The Crosby Corporation (hereinafter "Crosby") is made a defendant herein. Crosby is a Delaware corporation having its principal place of business at Boston, Massachusetts. Crosby is the principal underwriter or general wholesale distributor of the shares of each load mutual fund in the Fidelity Group of Funds to securities broker-dealers, acting pursuant to a distribution agreement with each such fund. Crosby is a wholly-owned subsidiary of defendant Fidelity Management and Research Company and is a member of defendants Invest-

ment Company Institute and National Association of Securities Dealers, Inc.

18. Institutional Equity Corp. (hereinafter "Equity") is made a defendant herein. Equity is a corporation having its principal place of business at Houston, Texas. Equity is presently the principal underwriter or general wholesale distributor of the shares of each load mutual fund in the Summit Group of Funds to securities broker-dealers, acting pursuant to a distribution agreement with each such fund, and is a member of defendant National Association of Securities Dealers, Inc.

19. Piedmont Capital Corp. (hereinafter "Piedmont") is made a defendant herein. Piedmont is a Delaware corporation having its principal place of business at Englewood, New Jersey. Piedmont is presently the principal underwriter or general wholesale distributor of the shares of each load mutual fund in the Lexington Group of Funds to securities broker-dealers, acting pursuant to a distribution agreement with each such fund, and is a member of defendants Investment Company Institute and National Association of Securities Dealers, Inc.

20. Vance, Sanders & Company, Inc. (hereinafter "Vance, Sanders") is made a defendant herein. Vance, Sanders is a Maryland corporation having its principal place of business at Boston, Massachusetts. Vance, Sanders is the principal underwriter or general wholesale distributor of the shares of each load mutual fund in the Vance, Sanders Group of Funds to securities broker-dealers, acting pursuant to a distribution agreement with each fund, and is a member of defendants Investment Company Institute and National Association of Securities Dealers, Inc.

21. Wellington Management Company (hereinafter "Wellington") is made a defendant herein. Wellington is a corporation having its principal place of business at

Philadelphia, Pennsylvania. Wellington is the principal underwriter or general wholesale distributor of the shares of each load mutual fund in the Wellington Group of Funds to securities broker-dealers, acting pursuant to a distribution agreement with each fund, and is a member of defendants Investment Company Institute and National Association of Securities Dealers, Inc.

22. American Funds Distributors, Inc. (hereinafter "American") is made a defendant herein. American is a corporation having its principal place of business at Los Angeles, California. American is the principal underwriter or general wholesale distributor of the shares of each load mutual fund in the American Group of Funds to securities broker-dealers, acting pursuant to a distribution agreement with each fund, and is a member of defendants Investment Company Institute and National Association of Securities Dealers, Inc.

23. Fidelity Management and Research Company (hereinafter "FMR") is made a defendant herein. FMR is a Delaware corporation having its principal place of business at Boston, Massachusetts and is a member of defendant Investment Company Institute. FMR (or its wholly-owned subsidiary, Pacific Northwest Management & Research Company, hereinafter "Pacific") is the investment adviser to each load mutual fund in the Fidelity Group of Funds, operating under annual contracts which compensate FMR solely on the basis of a percentage of each fund's net assets, and is controlled by defendants Edward C. Johnson 2d, Edward C. Johnson 3d, D. George Sullivan, William L. Byrnes and Caleb Loring, Jr. Annual fees received by FMR from the Fidelity Group of Funds exceeded $15 million.

24. Summit Management and Research Corp. (hereinafter "Summit") is made a defendant herein. Summit is a corporation having its principal place of business at Houston, Texas. Summit is the investment adviser

to each load mutual fund in the Summit Group of Funds, and for many years was the principal underwriter of the shares of said funds.

25. Lexington Management Corp. (hereinafter "LMC") is made a defendant herein. LMC is a corporation having its principal place of business at Englewood, New Jersey and is a member of defendant Investment Company Institute. LMC is the investment adviser to each load mutual fund in the Lexington Group of Funds and for many years was the principal underwriter of the shares of said funds.

26. Each of the individuals named below is made a defendant herein. Except for Messrs. Loring, Byrnes and McEwan, each of said individuals is a Director of each mutual fund in the Fidelity Group of Funds and has additional affiliations as noted below:

Edward C. Johnson 2d; Chairman of the Board of Directors of each fund in the Fidelity Group of Funds, Chairman of the Board and (with Messrs. Johnson 3d, Sullivan, Byrnes and Loring) controlling shareholder of FMR and Director of Crosby, President and Director of Pacific.

C. Rodgers Burgin

William L. Byrnes, Director and President of FMR, Director of Pacific, and (with Messrs. Johnson 2d, Johnson 3d, Sullivan and Loring) controlling shareholder of FMR.

Alfred B. Cornell

Gilbert H. Hood, Jr.

Edward C. Johnson 3d, Executive Vice President of each fund in the Fidelity Group of Funds, Director of FMR and Pacific, Chairman of the Executive Committee of FMR, Director of Crosby, and

(with Messrs. Johnson 2d, Sullivan, Byrnes and Loring) controlling shareholder of FMR.

George K. McKenzie

George S. McEwan, Chairman of the Board of Crosby.

Horace Schermerhorn

D. George Sullivan, Vice-President of FMR, Director of Pacific and Crosby, President of each of the funds in the Fidelity Group of Funds, and (with Messrs. Johnson 2d, Johnson 3d, Byrnes and Loring) controlling shareholder of FMR.

Caleb Loring, Jr., Vice-President, Director and Secretary of Pacific and FMR, Secretary of Crosby, and (with Messrs. Johnson 2d and Johnson 3d, Sullivan and Byrnes) controlling shareholder of FMR.

27. Each of the following is made a defendant herein:

Merrill Lynch, Pierce, Fenner & Smith, Inc.
Reynolds Securities, Inc.
Bache & Co., Inc.
W. E. Hutton & Co.
Thomas, McKinnon Auchincloss Inc.
duPont Glore Forgan, Inc.
Walston & Co., Inc.
Hayden Stone, Inc.
Blyth, Eastman Dillon & Co., Inc.
Dean Witter & Co., Inc.
Hornblower & Weeks-Hemphill, Noyes Inc.
E. F. Hutton & Company, Inc.
Paine Webber Jackson & Curtis, Inc.

Each of said firms is a broker-dealer and a member of defendant National Association of Securities Dealers, Inc. and has entered into standard dealer's sales agreements with Crosby and one or more of defendants Equity,

Piedmont, Vance, Sanders, Wellington, or American, and other principal underwriters, which relate to the sale and distribution of capital shares of the Fidelity Group of Funds and one or more of the load mutual funds belonging to the Summit Group of Funds, the Lexington Group of Funds, the Vance, Sanders Group of Funds, the Wellington Group of Funds or the American Group of Funds, and to other load mutual funds. Each of said firms has made sales of said capital shares to members of the Investors Class and the Fidelity Investors Class.

28. The National Association of Securities Dealers, Inc. (hereinafter "NASD") is made a defendant herein. The NASD is an incorporated association of broker-dealers, headquartered in Washington, D.C. and registered as a securities association with the Securities and Exchange Commission.

29. The Investment Company Institute (hereinafter "ICI") is made a defendant herein. The ICI is an association of mutual funds, other investment companies, underwriters, investment advisers and broker-dealers, headquartered in Washington, D.C.

CO-CONSPIRATORS

30. Various corporations, firms and individuals, including other investment advisers, principal underwriters and broker-dealers, their identities being presently to plaintiff unknown, participated as co-conspirators in the violations charged herein and performed acts and made statements in furtherance thereof.

TRADE AND COMMERCE AFFECTED

31. The securities of load mutual funds, and of the particular funds which belong to the Fidelity Group of Funds, are sold and distributed by defendants in interstate commerce throughout the United States, as well as

within the District of Columbia and in foreign commerce between the United States and other nations. During the period of the violation hereinafter alleged, defendants have distributed said mutual fund shares in interstate and foreign commerce and in the District of Columbia and between other states and the District of Columbia, and have utilized interstate postal and communications facilities to carry out the activities alleged herein to be unlawful.

32. The American investing public has entrusted a substantial portion of its investment capital to the mutual fund industry. In 1971, there were more than 500 mutual funds in the United States with total net assets in excess of 55 billion dollars. Of these, approximately 420 were "load" mutual funds, as defined above, which funds accounted for more than 90% of industry assets and had more than 8 million shareholder accounts. Generally speaking, these accounts represent the investments of families of modest means. In 1966, for example, the median family income of such shareholders was between $11,000 and $12,000 per year and the median value of a shareholder's account was under $6,500. The great majority of purchases of mutual fund shares were subject to the maximum sales "load" in effect for each fund. In 1966, 83% of regular account purchases involved amounts less than $5,000. In 1970, the average purchase involved approximately $2,900.

33. After a short initial distribution period, during which a fixed number of shares are sold to the public by an underwriting consortium in much the same manner as shares in any other corporation, the shares of load mutual funds are continuously sold only through or by a general distributor or principal underwriter. The principal underwriter operates pursuant to an agreement with the mutual fund which typically gives the principal underwriter the exclusive right to continuously market

the shares of the mutual fund at wholesale. The principal underwriter then, in turn, enters into agreements with broker-dealers (hereinafter "sales agreements") throughout the intended area of distribution, frequently the entire United States, authorizing each broker-dealer to sell shares of the fund to the investing public and agreeing to sell to said broker-dealer the mutual fund shares necessary to fill investors' orders, and further providing that the broker-dealer must then re-sell the shares to the investor from its own account as principal. Approximately three-quarters of all load fund shares distributed in the United States are distributed by the twenty largest principal underwriters. In 1970 broker-dealers accounted for more than three-quarters of the retail sales (in dollars) of load fund shares with direct sales by principal underwriters or their captive sales forces accounting for the remainder.

34. As distinguished from mutual funds, common stock and other securities of other corporations are purchased and sold in a wide variety of methods. The most common is for an investor to engage a broker-dealer to act as agent for the investor, which broker-dealer will then execute the order of the investor in the manner most favorable to the investor's interests, in accordance with the fiduciary duty owned by said broker-dealer to the investor. Usually, the broker-dealer will execute the order by acting in his capacity as a broker by purchasing or selling the security on behalf of his client from or to other investors through the facilities of a national or regional securities exchange or over-the-counter market. For the brokerage service so performed, the broker-dealer charges the investor a commission based upon the number of shares involved and the total dollar amount of the transaction. A broker-dealer may also execute the investor's order by selling from or buying for the broker-dealer's own account as principal at an appropriate mark-up or mark-down in price. Of course, if such a principal

transaction is called for, the broker-dealer's fiduciary responsibility to the investor requires that full disclosure be made and that the investor's best interests guide the broker-dealer in his execution of the order. Regardless of the method of execution for such transactions in corporate securities, the broker-dealer charges a commission or price differential significantly lower than the sales "load" charged by the same broker-dealer on sales of load mutual funds to investors. Despite the above, and as a direct result of the violations of law hereinafter alleged, defendant broker-dealers do not act as brokers in the execution of customers' orders to trade load fund shares, rather they act as dealers selling from or buying for their own account.

35. Each defendant broker-dealer has agreed with defendant Crosby that, among other things, it will not act as a broker in any transaction between members of the Fidelity Investors Class, involving shares of mutual funds which belong to the Fidelity Group of Funds or otherwise offer for sale such shares, unless the price to the investor is equal to the price of such shares (including the sales load) then available from Crosby, viz., the "public offering price." Similar, and in some cases identical, agreements exist between and among said broker-dealers and the other defendant principal underwriters barring, or effectively eliminating any benefit in brokered transactions between members of the Investors Class involving shares of other load mutual funds. By such agreements and other understandings and practices, the nation's broker-dealers are prevented and restrained from acting as brokers in transactions between investors involving load mutual fund shares.

36. The benefits accruing to Crosby and other underwriters, to the broker-dealers and to FMR, its controlling shareholders and others similarly situated from such agreements to restrict and limit the marketability of

mutual fund shares are clear and substantial. As long as the broker-dealer is so prevented from performing a brokerage function, the investor must pay the price specified for said shares in the prospectus, which in the case of the Fidelity Group of Funds is set by Crosby, FMR and the individual defendants, and which price in all cases includes a sales charge or "load" significantly in excess of the commissions paid to securities brokers for their services as brokers in transactions involving other securities of equivalent value. In 1970, broker-dealers' income from load mutual fund sales was approximately $195 million.

37. For a purchase involving less than $10,000, the typical load mutual fund sales charge today (including those for the Fidelity Group of Funds) is 8.5% of the offering price or 9.3% of the actual dollar amount invested by the public investor. In other words, $8.50 of each $100.00 spent by an investor for mutual fund shares is retained by the broker-dealer and by the underwriter, leaving the investor with only $91.50 in asset value put to work in his name. In the case of Fidelity Group funds, this $8.50 is presently split $7.00 to the broker-dealer (7.7% of the dollars invested) and $1.50 to Crosby (1.6% of the amount invested). For the average 1970 mutual fund purchase of $2,900.00, the net amount invested would be $2,653.50, with $203.00 retained by the dealer and $43.50 retained by Crosby, for a total sales charge or "load" of $246.50. The shares of the Summit, Lexington, Wellington, American and Vance, Sanders Groups of Funds are distributed under similar financial arrangements. There is no charge for redemption of shares in a Fidelity Group fund, although some load mutual funds do charge redemption fees as well.

38. By contrast, an equivalent $2,653.50 purchase *and sale* (the "round trip") of common stock, including stock in "closed-up" and "closed-end" funds, on the New York

or American Stock Exchanges (or over-the-counter) would today involve total in-and-out brokerage commissions of $91.78 for a 100 share lot at $26.54 per share, or 3.4% of the dollar amount of the investment; thus the sales "load" now commonly charged on such a purchase of "load" fund shares is 273% greater than brokerage commissions on two trades of an equivalent investment in common stock. If higher amounts are invested, the difference increases substantially. Upon information and relief, brokerage commission rates will decline in the future to an even lower level.

39. The unusually high return to the broker-dealer for selling shares of a load mutual fund compared to normal brokerage commissions is a powerful incentive for broker-dealers vigorously to sell such fund shares to investors by minimizing both the inherent disadvantages of funds and the benefits of other forms of investment. The funds, by giving the broker-dealer a large share of the "load", greatly increase his desire to sell the particular fund shares involved, as opposed to shares of "closed-end" or "closed-up" funds or common stock generally. The sales generated by such a large and motivated sales force in turn increase the total assets of the particular mutual fund in question (but not its assets-per-share, the only figure of relevance to an investor), thus maximizing, at the expense of the investor, the income of FMR and other fund "advisers" which are compensated out of net fund assets by a formula solely (in FMR's case) or primarily based upon a percentage of the total amount of such assets. Under this formula FMR and other "advisers" are rewarded not only for their success as investment advisers and managers, but also for the success of the sales effort by Crosby and the broker-dealers.

40. The agreements between and among defendants frustrate and restrain the development of any meaning-

ful secondary market for shares of load mutual funds in general and Fidelity Group Funds in particular. In 1971, for example, investors purchased $5.2 billion in new mutual fund shares and redeemed $4.8 billion, a substantial portion of which could have been "crossed" or matched with corresponding purchase orders if the artificial and unlawful scheme herein alleged were not in effect. Because of defendants' unlawful activities, purchasing and selling investors have been denied the benefits of a free, open and competitive market in said load mutual fund shares and the brokerage services of the nation's broker-dealers in the trading of mutual fund shares, the existence of which would have benefited both buyers and sellers, since the free market price would necessarily settle between the net asset value and the public offering price providing a higher price for sellers and a lower price for buyers, even after deducting reasonable brokerage commissions.

VIOLATIONS OF LAW ALLEGED

41. Beginning at a time prior to January 1, 1965, the exact date being unknown to plaintiff, the defendants and co-conspirators, in violation of Sections 1, 2 and 3 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 and 3, have been and are engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate and foreign commerce of the United States, commerce within the District of Columbia and commerce between the District of Columbia and the several States in securities issued by load mutual funds in general and load mutual funds belonging to the Fidelity Group of Funds in particular, have entered into and maintained in effect contracts in unreasonable restraint of such trade and commerce, have combined and conspired to monopolize, have attempted to monopolize and have monopolized said trade and commerce. Said violations are continuing and will

continue unless the relief hereinafter prayed for is granted.

42. The unlawful conduct, acts and practices of defendants and co-conspirators included, among other things, continuing agreements, understandings and concerted acts having the common design, purpose, objective and effect to:

(a) Prevent the defendant broker-dealers from acting as agents or brokers for the members of the Investors Class or Fidelity Investors Class seeking to purchase or sell the securities of one or more load mutual funds from or to other investors;

(b) Force the members of the Investors Class and Fidelity Investors Class to purchase the securities of load mutual funds in general, and those belonging to the Fidelity Group of Funds in particular, from the defendant broker-dealers or other broker-dealers or from Crosby or other underwriters, as principals, at artificially and unreasonably enhanced prices and sales charges;

(c) Prevent any defendant, including defendant broker-dealers, from "crossing" trades by investors of the securities of load mutual funds in general, and those belonging to the Fidelity Group of Funds in particular, by matching purchase orders with sales orders in their own organization or for others;

(d) Place an unreasonable restraint upon the alienation and marketability of the securities of all load mutual funds, including those belonging to the Fidelity Group of Funds;

(e) Prevent any securities exchanges from listing the securities of any load mutual funds, including those belonging to the Fidelity Group of Funds;

(f) Prevent, restrain, lessen and eliminate competition in the trading of the securities of load mutual

funds in general and the Fidelity Group Mutual Funds in particular among defendant broker-dealers;

(g) Confer upon the underwriter and individual defendants the power over the price of securities of load mutual funds in general and those belonging to the Fidelity Group of Funds in particular and the power to exclude competitors from trading in such securities and thus to exploit the defendants' dominant share of the trading in such securities;

(h) Maintain high, arbitrary and noncompetitive sales charges for the sale of securities of all load mutual funds including those belonging to the Fidelity Group of Funds;

(i) Prevent broker-dealers from purchasing, as principals, load mutual fund shares from investors at a price higher than the net asset value of such share, from reselling to investors from inventory at the public offering price or from trading with other broker-dealers at any price other than the public offering price;

(j) Deprive the plaintiffs and the public of the benefits of free and open competition in the distribution and trading of the securities of load mutual funds including those belonging to the Fidelity Group of Funds, and,

(k) Fraudulently to conceal and obscure, to the greatest extent possible, all of the aforesaid from the members of the Investors Class, Fidelity Investors Class and the public at large.

43. Defendants knowingly and willfully did those things which, as hereinabove alleged, they combined and conspired to do, and each defendant accepted, adhered to and participated in the common design and scheme knowing that concerted action was contemplated and invited, and that such cooperation was essential to the success of the scheme.

INJURY TO PLAINTIFFS

44. During the period of defendants' conspiracy, plaintiff and the members of the Investors Class and the Fidelity Investors Class purchased and redeemed (sold) capital stock of load mutual funds in general and those belonging to the Fidelity Group of Funds in particular and, by reason of the violations of law herein alleged, paid more for said purchases and received less for said sales than would have been the case in the absence of said violations of law, and, as a result thereof, have been injured and damaged in an amount which is presently undetermined, estimated as millions of dollars. When a reasonable approximation of the total amount has been ascertained, plaintiff will ask leave of Court to insert said sum herein. Furthermore, plaintiff and the other members of the Investors Class and the Fidelity Investors Class are presently being deprived of a free competitive market in which to trade load mutual fund shares and will continue to be so deprived unless and until the injunctive relief prayed for herein is granted.

PRAYER

WHEREFORE. plaintiff prays that judgment be entered in her favor and in favor of each member of the class and subclass represented by her, jointly and severally against the defendants named herein, as follows:

(a) For threefold the amount of damages determined to have been sustained by plaintiff and the members of the Investors Class and the Fidelity Investors Class, respectively, plus interest, as a result of the aforesaid violation of law, together with the costs and expenses of suit and a reasonable attorney's fee;

(b) For a permanent injunction enjoining and restraining defendants and each of them from continuing the violations hereinbefore alleged; and

(c) For such other and further relief as the Court may deem just and proper.

SECOND CLAIM
(Securities Law)

JURISDICTION AND VENUE

45. This claim seeks relief for violations of the Securities Exchange Act of 1934, as amended ("1934 Act"), 15 U.S.C. §§ 77b, *et seq.*, including but not limited to Section 10(b) thereof, 15 U.S.C. § 78j(b); the Investment Company Act of 1940, as amended ("1940 Act"), 15 U.S.C. §§ 80a-1, *et seq.*; and the Rules and Regulations of the Securities and Exchange Commission issued pursuant thereto, particularly Rule 10b-5 of the Rules and Regulations issued under the 1934 Act, 17 C.F.R. 240.10b-5. Jurisdiction is conferred upon this Court by Section 27 of the 1934 Act, as amended, 15 U.S.C. § 78aa, and Section 44 of the 1940 Act, as amended, 15 U.S.C. § 80a-43.

This claim arose in the District of Columbia and acts and transactions constituting and in furtherance of the violations hereinafter alleged took place in interstate commerce and in the District of Columbia by use of the mails and other instrumentalities of interstate commerce; each of the defendants transacts business or does business or can be found or has an agent in the District of Columbia, or is otherwise amenable to the personal jurisdiction of this Court. Venue lies in the District of Columbia by virtue of the venue provisions of the United States Code, including Section 27 of the 1934 Act, 15 U.S.C. § 78aa, Section 44 of the 1940 Act, 15 U.S.C. § 80a-43, and 28 U.S.C. § 1391.

DEFINITIONS AND INDUSTRY BACKGROUND

46. The allegations contained in paragraphs 2 through 14 hereof are here re-alleged with the same force and effect as though set forth here in full.

THE PARTIES

Plaintiff

47. The allegations contained in paragraphs 15 and 16 hereof are here re-alleged with the same force and effect as though set forth here in full.

Defendants

48. The allegations contained in paragraphs 17 through 29 hereof are here re-alleged with the same force and effect as though set forth here in full.

CO-CONSPIRATORS

49. The allegations contained in paragraph 30 hereof are here re-alleged with the same force and effect as though set forth here in full.

TRADE AND COMMERCE AFFECTED

50. The allegations contained in paragraphs 31 through 40 hereof are here re-alleged with the same force and effect as though set forth here in full.

VIOLATIONS OF LAW ALLEGED

51. Beginning at a time prior to January 1, 1965, the exact date being unknown to plaintiff, the defendants and co-conspirators, in violation of the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Rules and Regulations promulgated there-

under by the Securities and Exchange Commission, particularly Rule 10b-5 issued pursuant to the 1934 Act, have been and are engaged in a combination, conspiracy, scheme, artifice and common device to defraud and deceive the members of the Investors Class and the Fidelity Investors Class in connection with the purchase and sale of securities of load mutual funds in general and load mutual funds belonging to the Fidelity Group of Funds in particular, and have directly or indirectly engaged in transactions, practices and courses of business which operated or would operate as a fraud or deceit upon the plaintiffs, all as described and defined in the prior paragraphs of this Complaint. Said violations are continuing and will continue unless the relief hereinafter prayed for is granted.

52. The allegations contained in paragraphs 42 and 43 hereof are here re-alleged with the same force and effect as though set forth here in full.

INJURY TO PLAINTIFFS

53. The allegations contained in paragraph 44 hereof are here re-alleged with the same force and effect as though set forth here in full.

PRAYER

WHEREFORE, plaintiff prays that judgment be entered in her favor and in favor of each member of the class and subclass represented by her, jointly and severally against the defendants named herein, as follows:

(a) For the amount of damages determined to have been sustained by plaintiff and the members of the Investors Class and the Fidelity Investors Class, respectively, plus interest, as a result of the aforesaid violation of law, together with the costs and expenses of suit and a reasonable attorney's fee;

(b) For punitive damages in such amount as the Court may determine adequate to set an example;

(c) For a permanent injunction enjoining and restraining defendants and each of them from continuing the violations hereinbefore alleged; and

(d) For such other further relief as the Court may deem just and proper.

DEMAND FOR JURY

Plaintiff hereby demands trial by jury of the factual issues raised by this Complaint, except as to the equitable relief demanded.

Dated: Washington, D.C.
December —, 1972

/s/ Carl W. Schwarz
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